

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7172

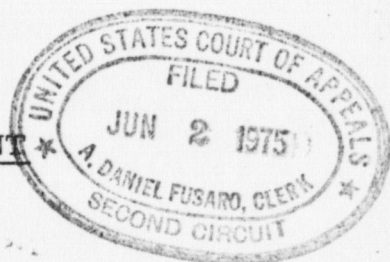
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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BROOK HOLLOW ASSOCIATES, *
Plaintiff-Appellant, *
vs. *
J. E. GREENE, INC., ET AL, *
Defendant-Appellees *

Appeal from the United States District Court for the
District of Connecticut, at Hartford

BRIEF FOR APPELLANT



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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Do the Connecticut Mechanic's Lien Statutes, Connecticut General Statutes Section 49-33 et. seq., on their face and as applied to the Appellant in this case, violate the due process clause of the Fourteenth Amendment to the United States Constitution in that the imposition of a mechanic's lien and the substitution of a bond therefor pursuant to the mechanic's lien statutes: (1) constitute state action (2) which implicate a constitutionally protected interest (3) without affording appellant adequate procedural safeguards incident thereto?

2. Should the Circuit Court of Appeals review the merits of the Appellant's constitutional claim at this stage of the litigation?

II. STATEMENT OF THE CASE

A. Nature of the Case and Proceedings in the United States District Court.

The Appellant commenced this action in the United States District Court for the District of Connecticut as an action for permanent injunction and damages as authorized by 42 USC Section 1983 and for a declaratory judgment pursuant to 28 USC Section 2201. Jurisdiction was asserted under 28 USC Section 1343(3) and (4) and 28 USC Section 2201.

The substance of the Appellant's claim is that the Connecticut mechanic's lien statutes, on their face and as applied to appellant, violate the due process clause of the Fourteenth Amendment to the United States Constitution.

The action was heard by the District Court upon the appellant's motion for convening a three-judge court, and upon such consideration the District Court dismissed the appellant's complaint for failure to present a substantial question.

B. Statement of Facts

Appellant is the owner, developer and general contractor of the Brook Hollow Health Care Facility located in Wallingford, Connecticut. On August 15, 1974, the Appellee J. E. Greene, Inc. issued a certificate of mechanic's lien, in which it claimed that it was owed certain money for furnishing materials and rendering services in the construction of the Appellant's facility pursuant to a contract with a subcontractor of the Appellant. Said certificate was lodged with the Town Clerk of Wallingford and recorded on the Land Records of that Town on August 19, 1974, by the Assistant Town Clerk of Wallingford, Appellee Grayce M. Rose.

As authorized by Sections 49-33 through 49-37 of the Connecticut General

Statutes, the issuance and recording of the above-described certificate of mechanic's lien was accomplished by the Appellee without the prior approval, review or other intervention of any judicial official or person other than the Appellees. Furthermore, under the Connecticut statutory scheme, the Appellant was not afforded an opportunity to be heard on the underlying merits of J. E. Greene, Inc.'s claim prior to the issuance and recording of the certificate of mechanic's lien. No expeditious procedure exists under Connecticut law by which the Appellant could obtain a hearing on the merits of the claim even subsequent to the recording of the lien certificate, and the only expeditious means by which the removal of such a certificate of mechanic's lien may be compelled is by substituting a surety bond for the full amount of such lien.

Prior to the issuance and recording of the certificate of mechanic's lien in this case, the Appellant had obtained a mortgage commitment for its property, for which it expended substantial sums of money. Because the Appellant expected to take up a permanent mortgage pursuant to this commitment prior to any final resolution on the merits of the mechanic's lien claim, and because the existence of a certificate of mechanic's lien on the land records would have prevented it from taking up this permanent mortgage, the Appellant, pursuant to the compulsion of the Connecticut statutory scheme, supplied a surety bond to J. E. Greene, Inc., which was accepted in substitution for the lien. The Appellant in fact took up the mortgage embodied in the commitment on January 3, 1975.

The Appellant has incurred the cost of an advance premium for this bond and has incurred liability for additional premium payments as well. J. E. Greene, Inc. continues to hold this bond at the present time.

The Appellant asserts that no facts exist sufficient to establish probable cause for J. E. Greene, Inc. to maintain a mechanic's lien upon the property or

to require the substitution of bond for said man.

III. ARGUMENT

A. Constitutional Question Presented

The action of the Appellees in this case, taken pursuant to the Connecticut Mechanic's Lien statutes, violates the due process clause of the Fourteenth Amendment to United States Constitution because:

1. It constitutes State action which
2. Deprives the Appellant of constitutionally protected interests
3. Without affording the Plaintiff sufficient procedural safeguards incident thereto.

1. State Action

It has long been recognized that the protection of the 14th Amendment applies only to state action, see, e.g. Civil Rights Cases, 109 U.S. 3 (1883), and, furthermore, the "under color of state law" provision in 42 U.S.C. Section 1983 is equivalent to the State action requirement of the 14th Amendment. See e.g. Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 n.7 (1970). Therefore, at the outset, it is important to determine whether the action of the Appellees herein constitutes state action within the meaning of the 14th Amendment and 42 U.S.C. Section 1983.

The procedure for the issuance and recording of a mechanic's lien and the substitution of a bond therefor exists in Connecticut by virtue of statute alone, and no such procedure was recognized under common law in Connecticut. See e.g. National Fireproofing Co. v. Huntington, 81 Conn. 632 (1909). The remedy does not depend on any private contractual agreement between the parties. In fact, the mechanic's lien may be filed, as it has been in this case, where no privity of contract exists. See Conn.

Gen. Stats. Sec. 49-35; Barlow Bros. Co. v. Gaffney, 76 Conn. 107 (1903); New Haven Orphan Asylum v. Hagerty Co., 108 Conn. 232 (1928).

The affirmative sanction by state statute of the mechanic's lien where no such remedy existed at common law, and where the remedy does not depend on private agreement between the parties is sufficient by itself to constitute state action within the meaning of the 14th Amendment. See Reitman v. Mulkey, 387 U.S. 369 (1967). Furthermore, the process of execution and enforcement of a mechanic's lien in Connecticut requires substantial State involvement at various stages. Town Land Records are utilized for the purpose of recording the lien certificate, and judicial proceedings are required to enforce payment under the lien or bond which is substituted for the lien. See Conn. Gen. Stats. Sec. 49-39; Note, Mechanic's Liens in Connecticut, 37 Conn. B.J. 209, 280-83 (1963). Such substantial state involvement in the mechanic's lien process further supports the existence of state action within the meaning of the 14th Amendment. Cf. Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948).

The substantial state involvement throughout the mechanic's lien process stands in marked contrast to certain "self-help" creditors' remedies which existed at common law and which could be effectuated by private parties without significant state action. See e.g., Shirley v. State National Bank of Connecticut 493 F. 2d 739 (2d Cir. 1974).

2. Deprivation of "Property" without Sufficient Procedural Protection

Once it is determined that state action has occurred which works a deprivation, two separate inquiries must be made to determine whether such deprivation has occurred in a manner which violates the due process clause of the 14th Amendment. First, the deprivation must be one which can be

characterized as a deprivation of life, liberty or property within the meaning of the 14th Amendment. See Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972). If the deprivation is not of such a nature, then no particular procedural safeguards need be afforded incident to the imposition of the deprivation. However, if the deprivation does affect a constitutionally protected interest, then certain procedural protections, of variable dimension, must be afforded incident to the action by which the deprivation is imposed.

(a) Existence of a Constitutionally Protected Interest

Certain general guidelines have been supplied by the Supreme Court for determining when a deprivation affects an interest which can be characterized as "property" within the meaning of the 14th Amendment. The Court has held that property for this purpose is a broad and majestic term, not to be narrowly construed. See Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Fuentes v. Shevin 407 U.S. 67, 88 (1972). Thus, the Court has unequivocally rejected any right-privilege distinction in characterizing protected property interests. See Board of Regents v. Roth, 408 U.S. 564, 571, 577 (1972).

Furthermore, it is not necessary that a final and tangible taking occur to result in a deprivation within the contemplation of the 14th Amendment; even a temporary deprivation which impairs the unrestricted use of property is sufficient to make the due process clause applicable as a threshold matter.

See Fuentes v. Shevin, 407 U.S. 67, 85 (1972); Sniadach v. Family Finance Corp. 395 U.S. 337, 343 (1969) (Harlan, J. concurring). The Court has specifically held that interference with contract rights may constitute a deprivation of property within the meaning of the 14th Amendment. See Perry v. Sinderman, 408 U.S. 593 (1972).

The most recent elaboration by the Supreme Court of the nature of protected interests within the meaning of the 14th Amendment occurred in the case of North Georgia Finishing, Inc. v. Di-Chem, Inc. U.S., 95 S. Ct. 719, 42 L.Ed. 2d 751 (1975). There, the deprivation at issue was the garnishment of a corporate bank account which occurred upon the commencement of a law suit in a Georgia state court. Pursuant to the relevant Georgia statute, the corporate defendant filed a bond in lieu of this garnishment. Thereafter the corporate defendant filed a motion to dismiss the writ of garnishment and to discharge its bond, asserting, among other things, that the statutory garnishment procedure was unconstitutional.

On appeal to the Georgia Supreme Court, the Court held that the garnishment did not implicate the due process clause since it served only to impound the bank account in the hands of the garnishee pending outcome of the main action.

The United States Supreme Court directly rejected this contention by holding:

although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to hearing of some sort... Here, a bank account, surely a form of property, was impounded and, absent a Bond, put totally beyond use during the pendency of the litigation on the alleged debt... Here a sizable bank account was frozen, and the only method discernable on the face of the Statute to dissolve the garnishment was to file a Bond to protect the Plaintiff creditor.

Thus, the Court made clear that a mere freezing in place of a property interest, thereby depriving the owner of its full use, is sufficient to implicate the due process clause.

Furthermore, the ability of the debtor to substitute a bond for the direct deprivation of property did not save the otherwise deficient statute.

Finally, the Court rejected the rationale that the due process clause was implicated only with respect to property interests in the consumer context:

it may be that consumers deprived of household appliances will more likely suffer irrevocably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the due process clause.

(b) Form of Procedural Protection Required

If a deprivation may be characterized as a deprivation of an interest within the protection of the 14th Amendment, certain procedural protections must be afforded incident to the imposition thereof. The form of such protection is variable and is determined by a balancing test in which the competing interests of the concerned parties is weighed. See Board of Regents v. Roth, 408 U.S. 564, 569-70(1972); Fuentes V. Shevin, 407 U.S. 67, 86 (1972). Prior to the advent of Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974), a line of Supreme Court decisions had held that once a threshold determination was made that a deprivation affected a protected party interest, it was necessary to afford an individual an opportunity to be heard prior to the imposition of the deprivation in all but truly extraordinary situations. See, e.g., Board of Regents v. Roth at 569-70; Fuentes v. Shevin at 82; Bell v. Bursor 402 U.S. 535, 542; Boddie v. Connecticut 401 U.S. 371 (1971); Goldberg v. Kelly 397 U.S. 254 (1971); Armstrong v. Manzo, 380 U.S. 545, 551 (1965); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313 (1950).

Extraordinary situations which justified imposing a deprivation of property without a prior hearing were found only in limited circumstances.

See e.g. Coffin Bros. v. Bennett, 277 U.S. 29 (1928) (necessary to protect public against bank failure); Ownbey v. Morgan, 256 U.S. 94 (1921) (necessary to secure quasi in rem jurisdiction); Ewing v. Mytinger and Casselberry, Inc., 339 U.S. 594 (1950) (necessary to protect public from misbranded drugs); North American Cold Storage v. Chicago, 211 U.S. 306 (1908) (necessary to protect public from contaminated food); Cafeteria Workers v. McElroy, 367 U.S. 886, 895-96 (necessary to protect national security interest).

In light of the above cases, the Mitchell opinion merits close examination on several points. First it is important to recognize that the Court in the Mitchell case did not address the question of threshold applicability. Rather, the thrust of the opinion was directed to the determination of the form of procedural protections which are necessary to meet due process requirements. See generally, The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 71-83 (1974).

In holding that the relevant statutory procedure "effects a constitutional accommodation of the conflicting interests of the parties," the Mitchell court paid meticulous attention to the specific procedural protections afforded by the statute at issue.

At least five factors were identified by the Court as justification for the decision in the case: (1) the nature of the creditor's claim and the substantive right upon which the creditor relied clearly appeared upon the face of the verified petition and affidavit which the creditor was required to submit; (2) the creditor was required to make an evidentiary showing to a judge and to obtain judicial authorization prior to imposing any deprivation; (3) the debtor was expressly afforded an opportunity by statute to have an immediate

hearing to terminate the deprivation at any time after its imposition; (4) the creditor was required to post a bond from which the debtor could be compensated in the event that the creditors' action was found to be improper; (5) the relevant facts incident to the ex parte imposition of the deprivation were sufficiently narrow to minimize the possibility of mistake.

The Supreme Court's subsequent decision in the case of North Georgia Finishing, Inc. v. Di-Chem, Inc., U.S. , 95 S. Ct., 719, 42 L. Ed. 2d 751 (1975) makes clear that the existence of such procedural protection is essential in order to comply with due process requirements. In striking down the Georgia garnishment statute at issue, the Di-Chem court found the following deficiencies in the statute to be fatal:

(1) No opportunity for an early hearing was provided at which the creditor was required to demonstrate probable cause for the garnishment;

(2) No participation by a judicial official was required to effectuate the garnishment;

(3) The writ and affidavit by which the garnishment was imposed were required to contain only conclusory allegations.

It will be shown below that the nature of the deprivation suffered by the Appellant is one which may be characterized as a deprivation of a protected interest within the meaning of the 14th Amendment. Furthermore, it will be shown that the procedural protection which is afforded under the Connecticut mechanic's lien statutes incident to the recording of a certificate of mechanic's lien or the substitution of a bond for such a lien does not comply with the test established by the Supreme Court in Mitchell and Di-Chem.

B. Nature of the Deprivation Imposed on the Appellant in This Case and Lack of Sufficient Procedural Safeguards Incident to the Imposition of this Deprivation

Prior to the time the certificate of mechanic's lien was recorded in the present case, the Appellant had executed a mortgage commitment agreement under which it had a contractual right to obtain a permanent mortgage based on the full value of its property. The recording of the lien deprived the Appellant of its right to take up said mortgage for the full value of its property and otherwise deprived the Appellant of the right to mortgage the property, convey the property or to have unrestricted use thereof. In response to the imposition of this deprivation by the Appellee, the Appellant substituted a bond in the full amount of the lien. This action was taken because it represented the only expeditious means available under Connecticut law to obtain a release of mechanic's lien. The Appellant sought such a release because it was about to take up a permanent mortgage pursuant to the aforementioned mortgage commitment, and the existence of the mechanic's lien would have impaired the Appellant's right to obtain this mortgage. The Appellant incurred a liability for bond premiums and is otherwise subject to liability under the terms of the surety bond which it was compelled to supply in this case.

The above described deprivations were imposed on the Appellant without any of the constitutionally required procedural safeguards. As authorized by the Connecticut mechanics lien statute, the lien certificate was filed by the Appellee J. E. Greene, Inc. on its own initiative without any involvement

of a judicial official. Furthermore, the lien certificate contained only conclusory allegations as to the Appellee's right to maintain a lien, as is shown in the copy of the certificate of mechanics lien which is attached as Appendix B to the complaint filed in the District Court.

Appellant was afforded no opportunity for a hearing prior to the filing of the mechanics lien, nor does any opportunity exist under the Connecticut statute for an early hearing after the lien has been filed or a bond substituted therefor. A property owner is without recourse to contest the merits of the claim underlying the lien until the lienor commences an action to foreclose upon the lien or bond, and the lienor is not required to commence such action for two (2) years after the time of filing of the lien. See Conn. Gen. Stat. Section 49-39.

The lienor is not required to furnish a bond to the landowner incident to his filing of a lien under the statute, and no such bond was furnished in this case.

Finally, the underlying facts which are necessary to establish the lienor's claim in this case are not capable of easy ex parte determination and are the subject of substantial dispute between the parties. Because, on the face of the lien certificate, the lienor does not claim privity of contract with the Appellant, the lienor's right to maintain a lien depends on whether or not the Appellant owes any obligation to the party through whom the lienor claims. See, Conn. Gen. Stats. Sections 49-35 and 49-36; Store v. Moomjian, 92 Conn. 476 (1918);

Ficken v. Edward's, Inc., 23 Conn. Supp. 378 (1962). Thus, two (2) sets of factual inquiries are necessary. First, it must be determined whether any obligation is due from the Appellant to the third party with whom it directly contracted. If no such obligation is due, then the Appellee may not claim any lien. However, if the Appellant is determined to owe some obligation to the third party with whom it directly contracted, then the Appellee must also show that it has a justifiable claim against this third party.

The conclusory statements contained in the Certificate of mechanics lien are seriously deficient in stating the relevant facts which are necessary to establish the Appellee's right to maintain a lien in this case.

The Appellant contends that the deprivation imposed on it in this case affected a constitutionally protected interest within the holdings of relevant Supreme Court decisions, and the procedures afforded the Appellant incident to this deprivation were insufficient to meet the test of the Supreme Court's most recent decisions on point in the cases of Mitchell v. W. T. Grant Company and North Georgia Finishing Inc. v. Di-Chem Inc.. This position is buttressed by the decisions rendered by the majority of other courts which have specifically considered the issue of the constitutionality of various state real estate attachment and mechanic's lien procedures. These cases will be examined below.

C. Cases Which Have Considered the Constitutionality of State Real Estate Attachment and Mechanics Liens Procedures

The most significant and directly relevant decision on point was rendered by the Connecticut Supreme Court in the Roundhouse Construction Corporation v. Telesco Masons Supply Co., Inc. (Vol. XXXVI, No. 43 Conn. Law Journal 1, April 22, 1975). In that case, the Court directly considered the constitutionality of the Connecticut mechanics lien statute and held that the statute was violative of the due process clause of the 14th Amendment to the United States Constitution as well as Article First, Section 10 of the Connecticut Constitution.

While the Appellant recognizes that the State court determination of a Federal constitutional issue is not res judicata nor does it operate as an estoppel by judgment upon a Federal Court, such a decision should be accorded great respect by the Federal Court and recognized as persuasive. See, e.g., Marquardt Corp. v. Weber County Utah, 360 F.2d 168, 172-73 (10th Cir. 1966); Smayda v. United States, 352 F.2d 251, 253 (9th Cir. 1965). Podolsky v. Devinney, 281 F.Supp. 488 (S.D.N.Y. 1968). Cf. Taylor v. Baltimore & Ohio Railroad Co., 344 F.2d 281 (2d Cir. 1965).

However, the state court decision should be regarded as conclusive on the federal court insofar as the state court decision serves to interpret the state statute. See Marquardt Corp. v. Weber County Utah, 360 F.2d 168 (10th Cir. 1966). Thus, insofar as the court in Roundhouse specifically defined the procedural shortcomings of the Connecticut mechanics lien statute, the federal court is bound to accept this interpretation of this statute.

Furthermore, the Appellant urges the federal court to adopt as persuasive the reasoning of the Connecticut Supreme Court on the ultimate constitutional issues.

The Roundhouse decision speaks to both elements of the due process analysis which were outlined above: 1) the Court found that, as a threshold matter, the due process clause was applicable in the mechanic's lien situation and that the imposition of a mechanic's lien implicated a constitutionally protected interest; and 2) the Court found that the procedures incident to imposing the deprivation were insufficient.

In directly rejecting the contention of the lienor that the "taking" of property under a mechanic's lien does not implicate the due process clause, the Roundhouse court held: "It is true that the deprivation which results from the filing of a mechanic's lien is not as obvious or as great as the dispossession of property under the statute struck down in Fuentes v. Shevin 407 U.S. 67, and Sniadach v. Family Finance Corporation, 395 U.S. 337, but the recording of a mechanic's lien, while it does not prevent alienation of the property, does, as a practical matter, severely restrict the opportunity for and possibility of its alienation. As the United States Supreme Court observed in Fuentes v. Shevin 'any significant taking of property by the State is within the purview of the Due Process Clause.'"

The Court then went on to cite with approval the recent Supreme Court opinion in North Georgia Finishing Inc. v. Di-Chem Inc. "Although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to a hearing of some sort."

By taking this view that the due process clause is implicated as a threshold matter in the mechanics lien situation, the Connecticut Court adopted a view consistent with a line of cases which have held that the recording of a real estate attachment implicates the due process clause. As one such case has held: "the interest created by an attachment operates as a superior interest against subsequent purchasers, mortgagees or attaching creditors and thus restricts the owner's ability to sell or mortgage this property at its full value. The determinative impact of the attachment is that it deprives the owner of a property right or interest, significant not only to him in his use of the property, but to the attaching party as well. Deprivation does not require the actual physical taking of the property or the thing itself. It takes place when the free use and enjoyment of the thing or the power to dispose of it at will is affected. Similarly, the unrestricted use of property has been recognized as an interest or right which may be protected even from temporary deprivation." Bay State Harness R & B Ass'n v. PPG Industries, Inc., 365 F. Supp. 1299, 1305 (D. Mass. 1973) (3 Judge court), (emphasis added).

Accord Gunther v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (D. Me. 1973) (3 judge court); Clement v. Four North State Street Corp., 360 F. Supp. 933 (D.N.H. 1973) (3 judge court); Idaho First National Bank v. Erickson, 41 U.S.L.W. 2492 (D. Idaho 1973).

Under the above analysis, it is clear that the Appellant herein suffered a deprivation as a result of the initial filing of the Certificate of Mechanics' Lien which implicated a constitutionally protected interest. In the words of the Connecticut Court, this lien served to "severely restrict the opportunity for and possibility of alienation" of the property. If the Appellant had not substituted a bond for this lien, it would have been prevented from conveying a mortgage deed pursuant to a mortgage commitment agreement which it had previously entered into.

As well as affecting the Appellant's protected interests in real property, the filing of the mechanics' lien in this case may also be determined to have interfered with a protected contract right of the Appellant. As discussed above, the Appellant had entered into a mortgage commitment agreement prior to the time the lien certificate was filed. The continued existence of the lien would have prevented the Appellant from realizing upon its contractual rights thereunder, and the Appellant was compelled to substitute a bond for the lien for this reason.

Finally, the Appellant rejects any notion that the substitution of a bond in this case impairs its constitutional claim. The Connecticut Supreme Court in the Roundhouse opinion directly addressed this issue. "The provision in General Statutes Section 49-37 for the dissolution of a mechanics lien upon the substitution of a bond does not afford adequate relief, since the authority of the court is limited to the issuance of the order dissolving the lien only upon the substitution of a bond "in such amount as a court of competent jurisdiction may adjudge to have been secured by such lien."

Furthermore, the United States Supreme Court decision in Di-Chem makes clear that the substitution of a bond does not remove the grounds for a constitutional challenge and does not save an otherwise unconstitutional statute. In the Di-Chem case itself, a bond had been substituted by the corporate defendant prior to the time it instituted any Court proceedings in regard to the garnishment.

In fact, by compelling substitution of a bond as the only expeditious means for removing a mechanics lien, the Connecticut statute imposes a direct and tangible taking of property which, beyond question, is within the contemplation of protected interests within the meaning of the due process clause. In this case, the Appellant has been compelled to pay a bond premium in order to furnish the bond and has incurred liability for future premiums so long as the bond continues to be necessary.

Once it is determined that the deprivation of a constitutionally protected interest has occurred, the second part of the due process analysis requires an examination of the procedural protections which are afforded incident to the deprivation. The Connecticut Court in Roundhouse thoroughly reviewed the specific procedures afforded under the Connecticut mechanic's lien statute. The Court found the statute deficient in the following respects:

1. "Under Connecticut procedure, the party claiming the lien is not required to post any bond or provide any surety to protect the owner of the property subjected to the lien against damages from an unsupportable lien."
2. "The filing and perfection of the lien may be done by a claimant entirely ex parte, without authorization, supervision or control by a judicial officer."
3. "The Certificate itself, which is recorded in the Town Clerk's office, is statutorily required to contain only a description of the subject premises, the date work was commenced, the amount claimed and a statement that the amount claimed is justly due. General Statutes Section 49-34. Such a certificate is a conclusory statement, totally devoid of any substantive underlying facts."
4. "Most conspicuously absent from the Connecticut procedure is any provision whatsoever for any sort of timely hearing, either before or after the recording of the lien, which would give the

property owner an opportunity to be heard or require a lienor to justify his lien. The statutes allow the lien to continue for two years without any further action on the part of the lienor, during which time the owner of the property is without recourse in the courts to contest the merits of the claim underlying the lien."

While, as stated above, this opinion by the Connecticut Court does not bind the Federal Court on the ultimate constitutional issues, the state decision is controlling as to the interpretation of the Connecticut statute. Thus, the due process analysis must take place in light of the specified procedural shortcomings of the Connecticut statute. While there may have been some doubt under the statute itself, and under certain lower state court decisions, as to whether any Court proceeding was available to the owner of property to challenge a mechanic's lien prior to the two year period in which foreclosure was required, the Roundhouse decision makes clear that no such opportunity for hearing exists. The constitutional inquiry should take place in light of this conclusion, as well as the other conclusions by the Connecticut Supreme Court defining the nature of the procedure incident to the imposition of a mechanic's lien.

In contrast to Roundhouse and the lower federal court decisions cited above, another line of cases has upheld real estate attachments and mechanic's lien procedures in various jurisdictions. Upholding real estate attachment procedures: Central Second Nat'l Bank of Lorain City v. Royal Homes, Inc.,

371 F. Supp. 476 (E.D. Mich. 1974); Ross v. Brown Title Co., 356 F. Supp. 595 (D. La. 1973) aff'd 412 U.S. 934 (1974); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100 (D. Conn. 1971). Upholding mechanic's lien procedures: Ruocco v. Brinker, 43 U.S.L.W. 2056 (D.S. Fla. 1974); Cook v. Carlson, 364 F. Supp. 24 (D.S.D. 1973); Spielman-Fond, Inc. v. Hansons, Inc., Case No. 72-417, D.Ariz. (Sept. 12, 1973) Aff'd without opinion U.S. , 42 U.S.L.W. 3646 (May 28, 1974).

A certain degree of conflict exists between this line of cases and the cases cited above which have overturned various attachment and lien procedures. However, a number of these cases may be reconciled on their facts.

The case of Central Second Nat'l Bank of Lorain City v. Royal Homes, Inc. is readily distinguishable since it considered a real estate attachment which was made for the purpose of securing quasi in rem jurisdiction. Ex parte real estate attachments for this purpose have been recognized as valid throughout the history of constitutional law. See, e.g., Ownbey v. Morgan, 256 U.S. 94 (1921).

The Connecticut case of Black Watch Farms, Inc. v. Dick may be distinguished on the grounds that it was rendered prior to the Supreme Court decisions in Fuentes v. Shevin and North Georgia Finishing, Inc. v. Di-Chem, Inc. In light of the Court's holdings in these cases, the continued validity of the Connecticut decision must be severely questioned. See Bay State Harness Horse R & B Ass'n v. PPG Industries, Inc. 365 F. Supp. 1299, 1305-06 (D. Mass. 1973).

In three other cases which have upheld real estate attachment or mechanic's lien procedures, the Courts did not find it necessary to base their

decision on the rationale that procedural due process protection was not applicable as a threshold matter in such cases. Rather, the cases must be read for the more limited proposition that even conceding that a constitutionally protected interest was implicated, the procedures afforded by the relevant statutes were sufficient to avoid any constitutional infirmity. An examination of the state procedures which were at issue in each of these cases discloses that fuller protections were afforded thereunder than that which is afforded under the Connecticut mechanic's lien statute.

In Ross v. Brown, the Court considered the executory process procedure set out in Article 2631 et seq. of the Louisiana Code of Civil Procedure. Under this statute, no action can be taken by a creditor without a judicial determination of the appropriateness of the action. See Articles 2634 and 2638. Furthermore, after an ex parte judicial determination has been made, the debtor may compel a trial on the merits at any time after such determination if he objects to it. See Articles 2642, 2751-2754. These provisions give far more ample protection to an individual than the protection afforded by the Connecticut mechanic's lien statute under which no judicial intervention is necessary before a certificate of mechanic's lien may be recorded and under which a lien may persist for as long as two years before an affected party can begin to contest the lien on the merits.

In Cook v. Carlson, the Court considered the South Dakota mechanic's lien statute set out in Chapters 44-9 et seq. of the South Dakota Statutes. Under Chapter 44-9-26 of the statute, a party upon whose property a mechanic's lien

has been placed may make written demand on the lienor at any time after the lien has been recorded to commence suit to enforce such lien within 30 days after notice is given. A failure to bring suit within that time will result in forfeiture of the lien. This procedure also stands in contrast to the Connecticut procedure whereby a lien may continue for as long as two years before suit is commenced.

Finally, in Ruocco v. Brinker, the court considered the Florida mechanic's lien statutes set out at Chapter 713.01 et seq. of the Florida Statutes. Under the provisions of this statute, a party upon whose property a lien has been placed may himself file a complaint at any time after the lien has been recorded and compel the lienor to show cause as to the validity of the lien within twenty days. See Section 713.21 (4). Furthermore, under Section 713.22, an owner of property may compel the lienor to commence suit to enforce his lien within sixty days by giving the lienor appropriate notice. Again, this procedure offers far more adequate protection to the property owner than is afforded under the Connecticut mechanic's lien statute.

The case of Spielman-Fond, Inc. v. Hansons, Inc. presents a more direct conflict in the case law. In upholding the Arizona mechanic's lien statute, the Three-Judge District Court concluded that the deprivation suffered by a property owner as a result of the filing of a mechanic's lien was not sufficient to make procedural due process protection available as a threshold matter. The validity of this conclusion as a general matter may be severely questioned in light of the subsequent Supreme Court decision in North Georgia Finishing, Inc. v.

Di-Chem, Inc. and stands in marked contrast to the other decisions cited above. Furthermore, no facts were discussed in the Spielman-Fond case which indicated that the property owner involved had entered into a mortgage commitment agreement or an agreement to convey his property at the time the mechanic's lien was imposed. Therefore, no immediate deprivation, such as the impairment of a mortgage commitment agreement, was considered by the Court in concluding that the mechanic's lien did not affect a protected interest. Because such a mortgage commitment agreement existed in the present case at the time the mechanic's lien was filed, and, furthermore, because the plaintiff here has suffered a tangible deprivation by being compelled to substitute a bond for the mechanic's lien in order to avoid impairment of its mortgage commitment agreement, it may be contended that the present case is distinguishable on its facts.

Spielman-Fond may also be distinguished in regard to the second aspect of the due process test. The Arizona statute considered in that case, Ariz. Rev. Stat. Ann. Section 33-998, restricts the validity of a mechanic's lien to no longer than six months unless an action is brought to foreclose it within that period. In considering this six month limitation, the Connecticut Supreme Court in Roundhouse concluded that it seemed "to offer the bare minimum of due process protection consistent with the extent of the deprivation present." As has been stated above, the Connecticut procedure allows a mechanic's lien to exist for two years before the lienor is required to commence an action to foreclose the lien. This two year period far exceeds the Arizona provision, and certainly does not allow for an "early" hearing as required by the Supreme Court in Di-Chem

While it may not have any legal significance in the case at bar, the appellant feels compelled to point out that if the six month requirement existed in the Connecticut statute, the case at bar might now have been mooted since the lienor would have been compelled to commence a suit on the lien almost four months ago.

If the Spielman-Fond case had stopped at the District Court level, it would present no substantial obstacle to the Appellant's claim herein. Although it is urged that persuasive factual distinctions exist between the case at bar and the Spielman-Fond case, the case might be regarded only as a minority decision in any event. However, the case does merit additional consideration in light of its summary affirmance by the Supreme Court.

At the outset, it is important to recognize the limited significance of a summary affirmance by the Supreme Court. This has most recently been articulated by Chief Justice Burger in Fusari v. Steinberg, 43 U.S.L.W. 4121 (Jan. 14, 1975) (concurring opinion), where he stated "when we summarily affirm without opinion the judgment of a Three-Judge District Court we affirm the judgment but not necessarily the reasoning by which it is reached. An unexplicated summary affirmance settles the issues for the parties, and it is not to be read as a renunciation by this court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the court has not hesitated to discard a rule which a line of summary affirmances may appear to have established."

Under Rule 16 (d) of the United States Supreme Court Rules, the Court may consider all possible reasons why it should not set a case for argument

when it considers a motion to dismiss or affirm a case presented to it on appeal. Thus, it has been argued that a per curiam affirmance has essentially the same significance as a denial of certiorari. See R. Stern & E. Gressman, Supreme Court Practice, Section 7.18 (4th ed. 1969); Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 74n.365 (1964).

Clearly, a denial of certiorari does not imply either approval or disapproval of the decision reached by the lower court on the merits. See e.g. Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950) (Frankfurter, J., dissenting). Likewise, it has been argued that a per curiam affirmance by the Supreme Court has no implication for either approval or disapproval of the merits of the decision which is affirmed. See Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 74n. 365 (1964). In fact, a number of cases have been identified in which the Supreme Court reversed the position it had taken in a per curiam affirmance upon subsequent plenary consideration of the issues involved in such a case. See cases cited in Port Authority Bondholders Pro. Com. v. Port of N.Y. Auth. 387 F. 2d 259, 262 n. 3 (2d Cir. 1967); Serrano v. Priest, 5 Cal. 3d 584, 616, 487 P. 2d 1241, 1264, 96 Cal. Rptr. 601, 624 (1971).

In light of the factual distinctions between the case at bar and Spielman-Fond which have been outlined above and in light of the subsequent plenary consideration of the due process issue by the Supreme Court in North Georgia Finishing, Inc. v. Di-Chem, Inc., it is urged that the summary affirmance by

the Supreme Court of Spielman-Fond does not represent conclusive authority in the case at bar. Therefore, it is urged by the Appellant that this court adopt the reasoning of the Connecticut Supreme Court in Roundhouse as persuasive.

D. Appropriate Forum for Decision

In determining the appropriate forum for decision in this case, two (2) inquiries are relevant. First, it is necessary to determine whether this case may be properly decided at this stage in a federal court rather than a state court. Second, if a federal forum is deemed appropriate, it is necessary to determine whether the Circuit Court of Appeals may review this case on its merits or if a remand to the United States District Court is required. These issues are addressed below.

1. Appropriateness of a Federal Forum

The Appellant commenced this action in the United States District Court as an action for permanent injunction and damages under 42 U.S.C. Section 1983 and asserted jurisdiction under 28 U.S.C. Section 1343 (3) and (4).

The Supreme Court has made clear that by virtue of these jurisdictional statutes "Congress imposed a duty upon all levels of the Federal judiciary to give due respect to a suitor's choice of a Federal forum for the hearing and decision of his Federal constitutional claims.... Escape from that duty is not permissible merely because State courts also have the solemn responsibility, equally with the Federal courts, to guard, enforce, and protect every right granted or secured by the Constitution of the United States. ...We yet like to believe that wherever the Federal courts sit, human rights under the Federal constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." Zwickler v. Kutta 389 U.S. 241 at 248 (1967). Accord Mitchum v. Foster, 407 U.S. 225, 238-39 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437-38 (1971).

This Court has reiterated the responsibility of the Federal courts in a case which specifically concerned a due process challenge to state procedure: "Federal courts are fully competent to consider such issues and are the primary forum for vindicating Federal rights." Escalera v. New York Housing Authority, 425 F.2d 853 at 865 (2d Cir. 1970) . Accord Hall v. Garson, 430 F.2d 430, 434-36 (5th Cir. 1970) .

The litigant's choice of a Federal forum for constitutional claims is not without limit, however. A judicially created limitation on the ability to litigate a claim in a Federal court exists by virtue of the so called "abstention doctrine".

This doctrine and the concerns relevant thereto have been well summarized by the Fifth Circuit. "Abstention allows a federal court whose jurisdiction has been properly invoked to postpone decision, pending trial in a state court when the federal result might turn on issues of state law. The doctrine, which had its genesis in an opinion by Mr. Justice Frankfurter in 1941... was developed to minimize federal state friction and to avoid unnecessary decisions of constitutional issues. ... However, every constitutional right under every circumstance is not to be put on ice awaiting the hearing of the anvil of state adjudication. Since the doctrine has the effect of frustrating a federal litigant in his choice of an otherwise appropriately invoked federal forum, it has been applied only in narrowly limited "special circumstances." ... Generally, then, federal courts have abstained only where applicable state law which would be dispositive of the controversy was unclear and where a state court interpretation of the state law question might obviate the necessity of deciding the federal constitutional issue." Hobbs v. Thompson, 448 F.2d 456 at 462 (5th Cir. 1971). Accord Wright v. McMann, 387 F.2d 519, 524-25 (2d Cir. 1967) .

The Supreme Court has made clear that abstention is only appropriate where unresolved issues of state law exist which may only be authoritatively resolved by a state tribunal and which, by their resolution, would obviate the constitutional issues in the case. See, e.g., Kusper v. Pontikes, 414 U.S. 51, 53-55 (1973); Wisconsin v. Constantineau, 400 U.S. 433, 437-39 (1971); Zwickler v. Koda, 389 U.S. 241, 248-49 (1967).

In this regard, it is difficult to conceive of a case in which the relevant state law issues have been more clearly defined than in the case at bar. Here, during the pendency of this litigation, the Connecticut Supreme Court has directly construed the mechanic's lien statute at issue in light of the Federal constitutional claim. In so doing, it has specifically defined the procedures which are afforded under the statute. Thus, the federal court may directly consider the adequacy of these defined procedures in light of Federal constitutional standards without any need for further clarification by the state court of the mechanic's liens statute.

2. The Circuit Court of Appeals Is an Appropriate Forum for Decision of this Case

In the United States District Court, the Appellant made an application for the convening of a Three Judge District Court under 28 U.S.C. Section 2281. In acting upon this application, the District Court refused to convene a Three Judge District Court, and, furthermore, dismissed the Appellant's complaint.

In the present posture of this litigation, review by this court of the constitutional issues presented is appropriate, and remand of the case for consideration by a Three Judge District Court is not required.

28 U.S.C. Section 2281 requires decision by a Three Judge District Court in cases which involve "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of such statute." (Emphasis added).

In interpreting this statute, courts have consistently recognized that it is to be narrowly and technically construed. See, Mitchell v. Donovan, 398 U.S. 427 at 431 (1970). In this regard, the convening of a Three Judge Court is not required "merely because a State statute is involved, but only when a State statute of general and statewide application is sought to be enjoined." See, Moody v. Flowers, 387 U.S. 97 at 101 (1967). Furthermore, the injunctive relief sought in the action must run against a state officer. See, Hall v. Garson, 430 F.2d 430, 442-43 (5th Cir. 1970).

The Connecticut mechanic's liens statute is a statute of statewide applicability, and thus the first requirement which would necessitate the convening of a Three Judge Court is met. Cf. Turner v. Fouche, 396 U.S. 346, 353 N.10 (1970); Cleveland v. United States, 323 U.S. 329, 332 (1945); Spielman Motor Sales Co., Inc. v. Dodge, 295 U.S. 89 (1935). However, in the present posture of the litigation, the Plaintiff Appellant's claim for relief does not require the enjoining of any action by a State official. Because a surety bond has been substituted in lieu of the mechanic's lien certificate, the only injunctive relief which the Appellant requires runs against a private party to compel it to release the bond. Thus, even though a state official is named as a party defendant in the action, a Three Judge Court is not required since the operative relief which the Appellant

seeks does not require enjoining a state official. See, e.g. Wilentz v. Sovereign Camp 306 U.S. 573, 581 (1939); Hall v. Garson, 430 F.2d 430, 442-43 (5th Cir. 1970); Hobbs v. Tom Norton Motor Company, 373 F. Supp. 956, 959-60 (S.D. Fla. (1974)); Frischman v. Durand, 350 F. Supp. 79, 83 (S.D.N.Y. 1972).

It should be pointed out, however, that the requirement for the involvement of a state official in regard to 28 U.S.C. Section 2281 is distinct from the concept of "state action" which implicates the 14th Amendment and at 42 U.S.C. Section 1983. See, e.g., Hall v. Garson, 430 F.2d, 430, 442 (5th Cir. 1970). As has been argued above, the requisite state action does exist in this case so as to implicate the due process clause as a threshold matter.

Apart from the technical requirements of 28 U.S.C. Section 2281, compelling policy reasons exist as well for a direct review by the Circuit Court of Appeals in this case. This Court has recognized that the policy underlying Section 2281 as well as the concern for judicial economy may permit review by the Court of Appeals even when review by a Three Judge District Court might otherwise be technically required. "Our own Three Judge Review, while not by a District Court, does serve to satisfy the essential purpose of Section 2281, which was to prevent a single district judge from paralyzing the enforcement of a statewide law. Since the principles governing the case are clear, to remand for the convening of a Three Judge Court at this stage would amount to a waste of judicial manpower." Seergy v. Kings County Republican County Committee, 459 F. 2d 308 at 313 (2d Cir. 1972).

In light of the above concerns, and in light of the arguments which have been advanced herein by the Appellant concerning the relevant constitutional issues, the Appellant urges that this Court reverse the judgment entered by the

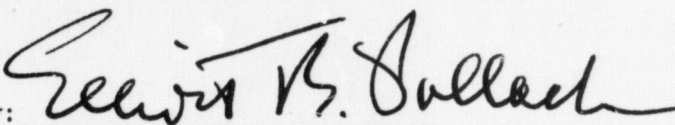
District Court.

How ever, if this Court believes that a Three Judge District Court is required to review the constitutional issues presented by this case, the Appellant urges that this Court enter an appropriate order for the convening of a Three Judge Court. The convening of a Three Judge Court is clearly appropriate here in light of the substantial issues presented by this Case and in light of the standard by which which the decision to convene a Three Judge Court is controlled. See, Goosby v. Osser, 409 U.S. 512, 518 (1973.)

IV. Conclusion

For the reasons stated above, the Appellant requests that this Court reverse the judgment of the District Court and remand this case with appropriate instructions for prompt hearing by a single District Court Judge.

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